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In the Supreme Court of the United States

OCTOBER TERM, 1998

ILLINOIS STATE UNIVERSITY, *et al.*,
Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,
Respondents,

AND

UNITED STATES OF AMERICA,
Intervenor-Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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Petitioners Illinois State University, *et al.* ("Petitioners") submit the following reply to the briefs filed by Dr. Iris I. Varner, *et al.* ("Plaintiffs") and the Solicitor General of the United States ("Solicitor General") (collectively "Respondents") in connection with Petitioners' pending petition for a writ of certiorari.

INTRODUCTION

The issue before this Court is whether claims made under the Equal Pay Act can be pursued in federal court, notwithstanding the Eleventh Amendment. This Court has oft repeated the admonition that "abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States . . . ." *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Respondents, however, assert that the "fundamental constitutional balance" should in fact be undermined, notwithstanding the absence of any clear statutory language or congressional findings that a damage remedy in federal courts is necessary to protect the citizenry.

This Court should grant certiorari to resolve the disarray in the circuits on these issues and to prevent the tide of unconstitutional litigation against the States that has become commonplace in federal courts across the country. At the very least, this petition should be held pending this Court's resolution of the *Kimel* case. *See Kimel v. Florida Board of Regents*, 139 F.3d 1426, 1432-33 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999). Certiorari was granted in *Kimel* on January 25, 1999. *See id.* *Kimel*, which involves the Age Discrimination in Employment Act ("ADEA"), raises precisely the same question of congressional intent (involving identical statutory language) as does this petition. *Kimel* likewise raises the question of whether (and under what circumstances) Congress may legislate beyond the terms of the Fourteenth Amendment when it regulates the

employment practices of the States themselves, particularly when such legislation purports to abrogate Eleventh Amendment immunity. While the Equal Pay Act presents a clearer case of legislative alteration of a substantive constitutional rule than does the ADEA, this Court's resolution of the issues in *Kimel* will nevertheless have a material impact on the resolution of the issues raised in this petition.

I. THE EQUAL PAY ACT DOES NOT INCLUDE THE UNEQUIVOCAL LANGUAGE NECESSARY TO ABROGATE ELEVENTH AMENDMENT IMMUNITY

Notwithstanding its halfhearted protestations, the Seventh Circuit plainly relied upon legislative history in reaching its conclusion that Congress intended to abrogate Eleventh Amendment immunity in passing the Equal Pay Act. *See* App. at 6a ("In deciding whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity under the Equal Pay Act, it is helpful to consider the context and history of the statute."). This alone is sufficient reason to reverse the decision of the lower court.[1] *See, e.g., Dellmuth*, 491 U.S. at 228 (holding that abrogation analysis cannot be based upon anything other than the text of the statute itself).

Relying on a criminal case unrelated to the Eleventh Amendment, Respondents now argue that the lower court's reliance on legislative history is acceptable. *See* Gov. Opp. at 11 (citing *Bailey v. United States*, 516 U.S. 137, 147 (1995)). Such a claim could not be more mistaken. This Court has clearly and repeatedly held *that in the*

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[1] The fact that the Seventh Circuit found it necessary to resort to the Equal Pay Act's legislative history speaks volumes about the other circuit court decisions that have reached the same conclusion. *See* Gov. Opp. at 4-5 (citing circuit court decisions).

Eleventh Amendment context, only the text of the statute itself may be considered. *See Dellmuth*, 491 U.S. at 228.

The obvious reason that the Circuit Court (and now Respondents) must look to the Equal Pay Act's legislative history is that the language of the statute does not support abrogation. Respondents rely entirely on language in the statute allowing suit against "public agencies" (including both state and federal governments) in "any court of competent jurisdiction. *See* Gov. Opp. at 5-6. As described in Petitioners' opening brief, however, it necessarily follows from the Circuit Court's reasoning that Congress must also have intended to waive the federal government's immunity to suit in state court. *See* Pet. Cert. at 12-15. Rules of interpretation demand that identical language be applied identically, particularly since the standards for abrogation of immunity are the same for both the States and the federal government. *See id.* at 13-14.

Because there is no substantive response to this argument, Respondents merely sidestep it, claiming first that the issue has nothing to do with the Eleventh Amendment and then adding that even if the federal government were sued in state court, it could remove the case to federal court. *See* Gov. Opp. at 9-10 n.4. The question at hand, however, is one of congressional intent as demonstrated by the text of the statute. No one (least of all the Solicitor General) seriously believes that the language of the Equal Pay Act demonstrates congressional intent to abrogate the sovereign immunity of the United States. Given that, it is absurd to hold (as the lower court did) that the same language "unequivocally" demonstrates congressional intent to abrogate the Eleventh Amendment immunity of the States. The language is the same, the abrogation analysis is identical, and the justification for treating the United States differently than the States cannot be found in the

only place it is permissible to look - the language of the statute itself. *See* Pet. Cert. at 13-14. Therefore, contrary to Respondents' assertions, the question of whether the federal government can be sued in state court has everything to do with the Eleventh Amendment, because it speaks directly and forcefully to the intent of Congress to abrogate.

Respondents also claim that the circuit courts have uniformly held that the language of the Equal Pay Act demonstrates a clear intent to abrogate. *See* Gov. Opp. at 4-5. This is at best a half-truth. There is no dispute that both the Equal Pay Act and the ADEA derive their enforcement provisions (including its forum selection clause) from the Fair Labor Standards Act ("FLSA"). *See* App. at 6a-7a; *see Kimel*, 139 F.3d at 1432-33; *see also Humenansky v. Regents of the Univ. of Minnesota*, 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 USLW 3504 (U.S. Feb. 1, 1999) (No. 98-1235). The *Humenansky* court, as well as one of the opinions in *Kimel*, concluded that the FLSA enforcement provisions (the same provisions incorporated into the Equal Pay Act) do not contain the clear statement of intent to abrogate required by this Court. *See id.*[2] Therefore, Respondents' claim that there is no conflict on this issue is not correct.

In light of this conflict and the clear reliance on legislative history in the opinion of the Seventh Circuit, this Court should grant certiorari. The Eleventh Amendment immunity of a State cannot be and should not be based upon an analysis that directly conflicts with this Court's precedents.

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2 The *Humenansky* opinion relies in part on language that is not contained in the FLSA's provisions. *See Humenansky*, 152 F.3d at 824-25.

II. THE SEVENTH CIRCUIT'S HOLDING THAT CONGRESS DID NOT EXCEED ITS REMEDIAL POWERS UNDER THE FOURTEENTH AMENDMENT CONFLICTS WITH THE DECISIONS OF THIS COURT

The *Boerne* decision laid to rest any notion that Congress is free, under the guise of the Fourteenth Amendment, to alter constitutional standards established by this Court. *See City of Boerne v. Flores*, -- U.S. --, 117 S. Ct. 2157, 2164-67 (1997). There can be no dispute that the Equal Pay Act does just that.

This Court has unequivocally held that there can be no finding of unconstitutional discrimination absent an affirmative showing of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 245-48 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274 (1979). As Respondents admit, the Equal Pay Act dramatically alters this standard by "establish[ing] a rebuttable presumption that unequal pay of opposite sex employees for equal work is intentional sex discrimination . . . ." *See* Gov. Opp. at 13. This, however, is exactly the "disparate impact" standard that this Court rejected in *Feeney*. *See Feeney*, 442 U.S. at 274.

Respondents claim that the Equal Pay Act represents acceptable "remedial or preventative legislation." *See* Gov. Opp. at 13-14. The Equal Pay Act, however, cannot be considered remedial or preventative if those words are to retain their common and natural meanings. In fact, there is a complete absence of any showing that the alteration of the standard is necessary to enforce the Constitution.

There is no evidence whatsoever that suits under the constitutional standard are ineffectual. *See* App. at 2a-26a. Nor has it been suggested that the States are systematically thwarting the efforts of women to seek equality under the proper, constitutional standard. *See id.*

And it has never been suggested that women fare more poorly in state court than in federal court. Even if such findings could support abrogation, Congress has never made them. *Compare South Carolina v. Katzenbach*, 383 U.S. 301 (1966).[3] Thus, under Respondents' reading, the Equal Pay Act would contravene this Court's holdings in *Katzenbach* and *Boerne*, since it would dispense with the need to show intentional discrimination without any showing of special needs or circumstances, thereby outlawing what amounts to constitutional state action. *See Boerne*, 117 S. Ct. at 2168.

Respondents now try to rely upon *Katzenbach* for the proposition that Congress has the power to prohibit and punish constitutional state action. *See* Gov. Opp. at 14. *Katzenbach*, however, was not a blank check. This Court could not have been more clear that its decision in *Katzenbach* was dictated by the exceptional conditions then existing in some of the States. *See Katzenbach*, 383 U.S. at 308-13, 333-35. As discussed above (*see* disc. *supra*

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[3] Respondents more or less admit that Congress did not consider whether there was specific evidence of constitutional violations by the States which would justify passage of the Equal Pay Act. *See* Gov. Opp. at 16-17. Respondents, however, claim that such a failure is supposedly not fatal, since Congress was entitled to rely on evidence of private discrimination, as well as institutional knowledge retained from work on previous legislation. *See id.* at 16-18. Such extrapolations, however, ignore the canons that weigh against abrogation of the Eleventh Amendment. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (describing "reluctance" to abrogate immunity). A finding of discrimination in private industry scarcely means that states discriminate or that their courts are inadequate. *Cf. Brzonkala v. Virginia Polytechnic Inst.*, Nos. 96-1814, 96-2316, 1991 WL 111891, at *69-70 (4th Cir. March 5, 1999) ("fourteenth amendment" legislation cannot survive judicial scrutiny absent specific evidence of unconstitutional behavior by the States themselves coupled with clear evidence that legislation is specifically adapted to address that behavior; broad assertions of discrimination are insufficient).

at 4-5), there has been no such showing (nor could there be) *vis-à-vis* the Equal Pay Act.

Just as fundamentally, *Katzenbach* addressed the question of Fourteenth Amendment authority in its own right (as did *Boerne*), and it did not consider the interplay between the Eleventh and Fourteenth Amendments. Neither *Katzenbach* nor *Boerne* suggest that abrogation of Eleventh Amendment immunity is appropriate in the absence of any need for a federal forum. *See Katzenbach*, at *passim*; *Boerne*, at *passim*.

Respondents nevertheless urge this Court to avoid such a "microscopic review," claiming that the need for a federal forum is irrelevant. *See* Gov. Opp. at 18. This argument, however, completely ignores the "essential" role that the Eleventh Amendment plays in our federalism. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Respondents are, therefore, simply mistaken in claiming that the analysis of whether legislation is "proportional and congruent" should take place without specific consideration of the interests protected by the Eleventh Amendment.[4] *See cf. Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 704 (4th Cir. 1999) ("[T]he broad-look review urged upon us by the government glosses over the crucial federalism concerns that animate the Eleventh Amendment.").

In urging this Court to decline review, Respondents only highlight the need for intervention. The Seventh Circuit and other courts simply have not heeded this Court's rulings in *Seminole Tribe* and *Boerne*. Unless this Court intervenes, several of the circuits will continue to

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[4] Respondents' claim that this Court did not consider the necessity of a federal forum when it decided *Fitzpatrick v. Blitzer*, 427 U.S. 445 (1976) is misguided. *See* Gov. Opp. at 18. In *Fitzpatrick*, as in a variety of cases involving race, the need for a federal forum has been long established. *See, e.g., Katzenbach*, at *passim*. Thus, the fact that the opinion in *Fitzpatrick* does not opine on this issue is not at all surprising.

treat the Equal Pay Act as proper "remedial" legislation under the Fourteenth Amendment, and thereby subject the States to unconstitutional damage actions in federal court. *See, e.g.*, Gov. Opp. at 13. Respondents lamely suggest that the Equal Pay Act is properly tailored to prevent "discrimination." *See, e.g., id.* at 15. But the definition of "discrimination" is exactly what is at issue. This Court established one definition in *Davis* and *Feeney*, but Congress established a different definition when it passed the Equal Pay Act. *See id.* at 13. That is the essence of the problem.

III. IF PLENARY REVIEW IS NOT GRANTED AT THIS TIME, THIS COURT SHOULD HOLD THE PETITION PENDING ITS DECISION IN *KIMEL V. FLORIDA BOARD OF REGENTS*, NO. 98-791

Following the filing of ISU's petition for certiorari, this Court granted certiorari in the consolidated cases of *Kimel v. Florida Board of Regents*, No. 98-791 and *United States v. Florida Board of Regents*, No. 98-796. *See Kimel v. State Bd. of Regents*, 119 S. Ct. 901 (1999) and *United States v. Florida Bd. of Regents*, 119 S. Ct. 902 (1999). *Kimel* raises many of the same issues presented by this case. In *Kimel*, a divided panel of the Eleventh Circuit held that the States were immune from suit in federal court under the ADEA. *See Kimel*, at *passim*. Like the Equal Pay Act, the ADEA borrows its enforcement provisions from the FLSA. Judge Edmonson's opinion in *Kimel* found that this same language was insufficient to support a finding of abrogation, *see Kimel*, 139 F.3d at 1432-33, and the petition in *Kimel* presents this precise question. *See* Petition for Certiorari in *Kimel v. Florida Board of Regents*, No. 98-791, at (I). The resolution of that issue in *Kimel* is, therefore, likely to be dispositive with regard to the same language under the Equal Pay

Act. Accordingly, holding this case pending resolution of the issue in *Kimel* is the proper course.

Kimel also presents similar questions concerning congressional power to abrogate State immunity under its Fourteenth Amendment powers. *See Kimel*, 139 F.3d at 1436-40, 1446-48. Reflecting the general "disarray" described by the Seventh Circuit in its opinion in this case, the circuit judges in *Kimel* differed widely regarding what constitutes proper Fourteenth Amendment legislation. *See id.*; *see also* App. at 20a n.12. One circuit judge found that "though Congress arguably has gone further in proscribing government employment practices that discriminate on the basis of age than have the courts in adjudicating claims under the Fourteenth Amendment, this merely reflects the differing roles of Congress and the courts." *See Kimel*, 139 F.3d at 1437 (Hatchett, C.J., concurring in judgment in part, dissenting in part). Another circuit judge disagreed, finding that the ADEA was not valid enforcement legislation because it did not "hew the contours of Supreme Court defined Fourteenth Amendment rights" and was not a direct and proportional response to "documented pattern of constitutional violation." *See id.* at 1446 (Cox, J., concurring in part and dissenting in part).

The Equal Pay Act presents this conflict in any even more acute form. The Equal Pay Act does not require a finding of intentional discrimination, while the ADEA typically does. *Compare Fallon v. Illinois*, 882 F.2d 1206, 1213 (7th Cir. 1989) *with Mullin v. Ratheon Co.*, 164 F.3d 696, 699-703 (1st Cir. 1999). As such, this case presents in some respects a more compelling case to invalidate Congress' purported abrogation of suits against the States. For this reason, it would be appropriate to consider both statutes next term. But even if this Court does not grant plenary review at this time, the Court's decision in *Kimel* will almost certainly have a material

bearing on the resolution of this case. Therefore, the instant petition should at least be held pending the outcome in *Kimel*.

CONCLUSION

For the foregoing reasons and those set forth in Illinois State University's petition, a writ of certiorari should be granted or, in the alternative, this Court should hold this petition pending resolution of the *Kimel* cases.

Respectfully submitted,

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